UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 1

READYJET, INC.	:	
	:	Cases:
Respondent	:	01-CA-132326
	:	01-CA-140878
and	:	01-CA-155263
	:	01-CA-159503
32 BJ SEIU NEW ENGLAND 615	:	01-CA-159509
	:	
Charging Party	:	

BRIEF IN SUPPORT OF RESPONDENT READYJET INC.'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND PROCEEDINGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Respondent, ReadyJet, Inc., respectfully excepts to the ALJ's Decision dated October 12, 2016 and Proceedings as follows and hereby requests that oral argument be taken in this case.

I. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

These consolidated cases involve allegations against ReadyJet, Inc. (herein "ReadyJet" or "Respondent" or the "Company") in response to efforts of 32 BJ SEIU New England 615 (herein "SEIU" or "Union") to organize Respondent's employees.[1] The allegations deal with three specific issues: (1) whether ReadyJet violated Section 8(a)(1) by engaging in unlawful interrogation, threats and surveillance as to employees Egla Cruz and Evelyn Martinez[2]; (2) whether ReadyJet violated Section 8(a)(1) by telling and issuing disciplinary warnings to five (5) employees (Claudio Batista, Francisco Luna, Julio Medina, Gerfi Mendez, and Sergio Restituyo) for violations of the company's "no-call/no-show" policy; and, (3) whether ReadyJet violated Section 8(a)(1) by terminating at a later date Batista and Luna for other violations of established ReadyJet policy.

These consolidated cases started as unfair labor practice charges filed at different times in 2014 and 2015.[3] On April 30, 2015, Cases 01-CA-132326 and 01-CA-140878 were consolidated and a Complaint issued. ReadyJet filed an Answer and Affirmative Defenses on May 13, 2015. The hearing was ultimately postponed, and on October 30, 2015, Case 01-CA-155263 was ordered to be consolidated with the above and an Amended Consolidated Complaint was filed. ReadyJet filed its Answer and Affirmative Defenses to the Amended Consolidated Complaint on November 11, 2015. Cases 01-CA-159503 and 159509 were

[1] As of the time of the hearing and this Brief, the Union is not the certified representative of the ReadyJet employees.
[2] ReadyJet does not except to the ALJ's findings and decisions as to Rafael Marty.
[3] Case 132326 was filed on July 8, 2014; Case 140878 on November 13, 2014, Case 155263 on July 1, 2015, Case 159503 on September 4, 2015, and Case 159509 on September 4, 2015.

consolidated with the above by a Third Order Consolidating Cases and a Second Amended Consolidated Complaint filed by the NLRB on January 28, 2016, to which ReadyJet filed its Answer and Affirmative Defenses on February 10, 2016. On July 5, 2016, ReadyJet filed an Amended Answer.

On July 25, 2016, the Board filed a Notice of Intent to Amend Third Order Consolidating Cases and Second Amended Consolidated Complaint.[4] The hearing was held before Administrative Law Judge Kenneth W. Chu on July 27 and 28, 2016, in Boston Massachusetts, ALJ Chu issued his decision on October 12, 2016.

B. READYJET'S BUSINESS AND OPERATIONS

ReadyJet is a contractor in the airline industry, operating out of Boston Logan International Airport, as well as other airports around the country. It provides, among other things, cleaning services for aircraft, as well as lavatory and water services for Jet Blue, out of Terminal C at Boston Logan, and Delta Airlines, which operates out of Terminal A. It is under contract with each of those airlines to provide for those services. Sarah Colon, ReadyJet's General Manager, oversees operations at both Terminal A and Terminal C. Tr. 229-30. There are approximately two-hundred forty (240) ReadyJet employees at Boston Logan. Tr. 230. Approximately one hundred (100) employees work out of Terminal A, ninety-five (95) work out of Terminal C and a small staff of ten (10) service U.S. Airways. Tr. 231. The basic distinction among the types of employees at the separate terminals are: (1) lav and water, and (2) groomers. Id. "Lav and water" is a term used for agents who perform the lavatory service in the aircraft and the potable water. Id. These employees drive a lav truck to the parked aircraft, connect a

[4] In this latter filing, entered into evidence at the hearing as GC Exhibit 4, the Board clarified the spelling of two ReadyJet employees, clarified allegations as to conduct by former ReadyJet employee Geraldo Almonte, and, most significantly, deleted Paragraph 7 (relating to allegations concerning written materials provided to employees by ReadyJet) and deleted Paragraph 18 (relating to a claim for relief under Section 8(a)(3) of the Act.)

hose to the aircraft and remove the waste from the aircraft. Id. With regard to the potable water, these employees use the same process but also replace the potable water for use on the next flight. Id. The groomers were those employees who cleaned the aircraft. Tr. 64, 76, 98, 100, 141.[5]

On June 15, 2015, in the evening, a strike occurred at Terminal A of Boston Logan by several ReadyJet employees. Among these employees were Claudio Batista, Francisco Luna, Julio Medina, Gerfi Mendez and Sergio Restituyo. The specific location of picket line activity was on the outside of Terminal A. The Union had decided weeks prior to the strike that a strike would occur at Terminal A involving ReadyJet employees. Batista, Luna, Gerfi and Mendez[6] were aware prior to the strike that they would not show up for work on the day of the strike. True to their word, none of these employees showed up for work. Critically, none of the employees called in to their supervisor or any contact person for ReadyJet to alert the Company that they would not be showing up for work. This factor is alarming because each employee knew that calling in when they planned to miss work was a policy of ReadyJet and they also knew that failing to call in would be a violation of Company policy and subject them to discipline. Not one of these employees called in. In the ensuing days after the strike, the employees received written disciplinary notices from the ReadyJet Overnight Manager, Giovannie Martinez, which related by its own words that the discipline was for failing to follow the established ReadyJet policy of calling in when they were to miss work. Despite inconsistent testimony from Batista, Luna, Medina and Mendez, Martinez consistently testified that the reason for the discipline was for no call/no show and for no other reason.

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[5] Since this brief only addressed excepted issues, Ready Jet does not restate all of the facts set forth in any and all pleading or the Brief it has submitted with his case to date, and incorporates all prior factual statements herein by reference as though fully set forth at this point.

[6] Restituyo was not called as a witness by the General Counsel.

Later that summer, and independent of each other, Batista and Luna were fired. Batista followed up his June 16, 2016 non-conformity with a series of absences and call-outs throughout the month of July, 2015, until he finally did not show up – again on a Monday – July 27, 2015. He was terminated for his violation of company policy.

For his part, Luna became involved in yet another performance issue as he failed to fill the water in preparation for an outbound flight, which is part of his duties. In addition, Luna falsified a Company record – lying about the fact that he did not do his duties.

Also a part of this consolidated action are events relating to employees Evelyn Gonzalez and Elga Cruz. These employees alleged that on January 7, 2014, they met with a Union organizer at the Food Court in Terminal C at Boston Logan for fifteen (15) minutes. There, Gonzalez and Cruz signed Union cards. GC Exh. 2 and 3. They subsequently met with ReadyJet supervisor, Rafael Felipe, since they were looking for information about the Union. They wanted to know how the Union functioned and what the objective was for the employees. Felipe gave them his opinion but, in the end, told them they had to make their own decision.

II. QUESTIONS INVOLVED

1. **Did the ALJ err in concluding that ReadyJet violated the Act by interrogating and threatening employees and creating the impression that their Union activities were being watched?** Exceptions 6-12, 37-38, 68-69 (Tr. 50-54, 60, 65-67, 71-73, 200-225).

2. **Did the ALJ err in concluding that ReadyJet violated the Act by telling employees that they were issued warnings for participating in a strike and by threatening employees with more severe discipline if they continued?** Exceptions 1-5, 14-36, 39-69 (Tr. 21-22, 26-36, 39, 78-82, 83-87, 91-92, 94-95, 99-105, 109-117, 119-122, 124, 138, 155-162, 164, 167, 172-177, 193-197, 200, 215).

3. **Did the ALJ err in concluding that ReadyJet violated the Act by issuing disciplinary warnings to employees Claudio Batista, Francisco Luna, Julio Medina,**

Gerfi Mendez and Sergio Restituyo? Exceptions 1-2, 13-14, 16-29, 40-52 (Tr. 21-22, 55, 83-85 , 91-92, 94-96, 100-105, 109-110, 112-117, 121,122, 194-197, 200, 215).

4. **Did the ALJ err in concluding that ReadyJet violated the Act by terminating Clauido Batista and Francisco Luna?** Exceptions 13-17, 27-32, 42-46, 53-69 (Tr. 55, 85-87, 91-92, 94-96, 113, 120-122, 124, 138, 193, 194-197).

III. LEGAL ARGUMENTS

A. The ALJ erred in concluding that ReadyJet violated the Act by interrogating and threatening employees Gonzalez and Cruz and creating the impression that their Union activities were under surveillance.

1. Timeliness of Cruz/Gonzalez Charges

As an initial matter, the ALJ erred by failing to conclude that the Cruz and Gonzalez charges were untimely. Section 10(b) of the Act provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge before the Board[.]" NLRB v. Plumbers & Pipe Fitters Local Union, 298 F.2d 427, 428 (7th Cir. 1962) (quoting 29 U.S.C. § 160(b)). Section 10(b) "requires that a charge be filed and served within the six month period of the alleged unlawful conduct." Dun & Bradstreet Software Services, 317 NLRB 84, 85 (1995), affd. sub nom. Kelly v. NLRB, 79 F.3d 128 (1st Cir. 1996). Of the alleged unlawful conduct occurred and then caused of action occurred more than six (6) months prior to the filing of the charge, the charge is untimely and the cause of action time – barred by Section 10(b). See, Ramey v. Dist. 14, Int'l Ass'n of Machinists & Aerospace Workers, 378 F.3d 269, 277-78 (2d. Cir. 2004).

It is undisputed that the charge filed with respect to Egla Cruz and Evelyn Gonzalez – that is, Case Number 01-CA-132326 - was filed on July 8, 2014, and that six (6) months prior to that filing date is January 8, 2014. It is also undisputed and demonstrated that by the record and

found by the ALJ that the conduct which the Union alleges to be unlawful interrogation, surveillance and threats occurred on January 7, 2014. ALJ December 18; Tr. 43-54; G.C. Ex. 2, 3. That is, the allegedly unlawful conduct occurred more than six (6) months prior to her filing of the charge, Case Number 01-CA-132326. Accordingly, the allegations therein are time-barred. Ramey, supra. Although the charge would have been timely if filed one (1) day earlier, "[d]eadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." Taylor v. Freeland & Kronoa, 503 U.S. 638, 644 (1992), quoting in Case Corp., 2001 NLRB LEXIS 981, *224 (Dec. 14, 2001). Thus, the ALJ's conclusions that ReadyJet violated the act in this regard was in error because of the statute of limitations.

2. Inconsistency of Testimony Between Gonzalez and Cruz

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Farm Fresh Co., Target One, LLC, 361 NLRB No. 83, slip op. at 13-14 (2014). Further, credibility determinations need not be all–or–nothing propositions – indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all of a witness' testimony. Id., slip op. at 14.

In this case, the ALJ improperly accepted wildly different versions of events with regard to Gonzalez and Cruz's meeting with the Union organizer on January 7, 2014 and subsequent meeting with Rafael Felipe. For example, Gonzalez could only identify ReadyJet supervisors by their vest color when they sat one meter apart. ALJ Dec. 18; Tr. 44, 49, 61 – 62. Gonzalez said that she thought the orange clad ReadyJet supervisors saw them talking to the organizer. ALJ Dec. 18; Tr. 56. Gonzalez testified that later Felipe told them to stay away from the Union. ALJ Dec. 18; Tr. 49 – 51, 56.

Cruz, on the other hand, testified that she did not observe any ReadyJet supervisors at the Food Court, even though the Food Court meeting was the same meeting that Gonzalez attended ALJ Dec. 18; Tr. 71-73. In another departure from Gonzalez's testimony, Cruz stated quite clearly that neither Felipe nor any ReadyJet management official had threated her or Gonzalez with losing their jobs if they supported the Union. ALJ Dec. 18; Tr. 71-73.

Interestingly, virtually the only testimony that Gonzalez and Cruz gave that squared with each other was that 'neither [Gonzalez nor Cruz] knew anything about the Union. ALJ Dec. 18; Tr. 64-66. This shared lack of experience bolsters Felipe's testimony that Gonzalez and Cruz started the conversation with *him* about the Union since he had experience as a former Union member. ALJ Dec. 19; Tr. 220-225. Thus, the ALJ's conclusion that Gonzales and Cruz were interrogated about their Union sympathies is in error. ALJ Dec. 21. Felipe made no threat of reprisal or force when viewed objectively. See., NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

3. Felipe's Answering Gonzalez and Cruz's Questions about Unions Threatens ReadyJet's rights under Section 8(c) of the Act.

The ALJ's decision reflects a total indifference to ReadyJet's Section 8(c) rights. By its terms, Section 8(c)[7]protects an employee's use of non-threatening and non-coercive speech in the context of labor relations and "manifests a congressional intent to encourage free debate or issues dividing labor and management." Linn v. United Plant Guard Workers 383 U.S. 53, 62 (1966). In this respect, the ALJ's analysis must not be confined to a simple evaluation of the rights of the employees under Section 8(a)(1) to associate freely for purposes of collective

[7] 29 U.S.C. § 158© states: "The expectancy of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or virtual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of their subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

bargaining. Rather, the ALJ must balance those rights against ReadyJet's right of free expression. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

The undisputed record evidence demonstrates that Felipe is a supervisor at Terminal C and it is his responsibility that employees have the proper equipment to do their job. ALJ Dec. 19; Tr. 218-219. Felipe testified that when the subject of the Union was raised by Gonzalez/Cruz, he gave them his opinion about previous experiences with the Union but also inferred that Gonzalez and Cruz could reach their own conclusions about the Union. ALJ Dec. 19; Tr. 200-225. Felipe openly discussed during his testimony about his own experiences when he worked for Aramark, ReadyJet's predecessor at Boston Logan. ALJ Dec. 19; Tr. 224-225. Clearly, neither Gonzalez nor Cruz were open Union supporters as they themselves admitted ignorance about unions. ALJ Dec. 20. Norton Audubon Hospital, 338 NLRB 320, 321 (2002); Intertape Polymer Corp., 360 NLRB 114 (2014).

Finally, support for Felipe's version of events comes in the form of Gonzalez's letter of resignation sixteen (16) months later. Her unsolicited thank you to ReadyJet described her experience as a "great" one. Tr. 60; R. Exh. 1. This letter contained no expression of fear, regret or reprisal. It undercuts the ALJ's findings that Felipe's protected remarks were coercive or threatening.[8]

4. The ALJ erred by Concluding that ReadyJet violated Section 8(a)(1) by Creating an Impression that the Alleged Union Activity of Gonzalez and Cruz was under Surveillance.

Management officials are permitted to observe public Union activity without violating Section 8(a)(1) of the Act, unless they do something "out of the ordinary." Arrow Automotive

[8] Other questions, if actually asked by Mr. Felipe, i.e. "what we were doing upstairs" and "what we were up to," are not necessarily related to any union activity and could easily be construed to be questions commonly asked by a supervisor of an employee.

Industries, 258 NLRB 860 (1981) enfd. 679 F.2d 875 (4th Cir. 1982). The "out of the ordinary" surveillance standard of Union activity in public places includes an employer's "unreasonably close" observance of organizers "as they finish their lunches." ALJ Dec. 23, citing Montgomery Ward & Co., 692 F.2d 1115, 1128 (7th Cir. 1982), enfd. 256 NLRB 800 (1981).

Here, this ALJ glosses over the fact that the fifteen minute impromptu "meeting" between Kamanou, Gonzalez and Cruz took place:

- At a public restaurant
- During lunch
- At a food court

Significantly, neither Gonzalez nor Cruz testified that their meeting with the Union organizer was interfered with or disrupted by the unknown ReadyJet supervisors. This was a critical fact that led to the Board's decision in Montgomery Ward. To the contrary, the evidence reveals that the employees sat at the table with Kamanou for as long as they needed and neither Gonzalez nor Cruz indicated at the time or later to Felipe that they were disrupted in any way.

It was also error for the ALJ to imply that ReadyJet supervisors were "peering" over shoulders through his citation to the Flexsteel decision. Flexsteel Industries, 311 NLRB 257 (1993). Unlike the aggressive supervisor in Flexsteel, however, no evidence exists that any ReadyJet supervisor was in need of any reason or excuse to observe Gonzalez or Cruz or that they were monitored over a period of time. An objective view reveals that the record is devoid of any evidence establishing ReadyJet's knowledge of actual Union activity at its Food Court at any point prior to January 7, 2014. See, Sigo Corp. 146 NLRB 1484 (1964). In summary, the testimony proffered by the General Counsel through Gonzalez and Cruz was neither consistent nor believable as to the surveillance claim.

B. The ALJ erred in concluding that ReadyJet violated the Act by allegedly telling employees they were issued warnings for participating in a strike and allegedly threatening further discipline.

The test for a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which may reasonably tend to interfere with the free exercise of employee right. See, NLRB v. Illinois Tool Works, 153 F.2d 811, 816 (7th Cir. 1946). Statements made by an employer that implicitly threaten discharge may be unlawful. Equipment Trucking Co., Inc., 336 NLRB 277 (2001). In light of this standard, the ALJ erred by concluding that Giovanni Martinez's remarks were clearly coercive and violative of Section 8(a)(a) of the Act. ALJ Dec. 14.

First, the ALJ claims that Martinez was a "top official" where there is no evidence of record as to this assertion. ALJ Dec. 14. His position as shift manager stands in contrast to the cited case – General Stencils, Inc. 195 NLRB 1109, 110 (1972) - which involved the company's General Manger who had the power to turn threats into reality. ALJ Dc. 14. Again, no evidence exists to demonstrate that Martinez was a General Manger or he had the power to turn treats into reality.

Next, the ALJ erred by finding that Batista, Mendez, Medina and Luna corroborated about "similar threats" from Martinez, claiming that their testimony over receiving warnings by Martinez because of their participation in the strike was 'consistent." ALJ Dec. 14. A close reading of the record, however, reveals why this important issue was mishandled. Batista did testify that Martinez stated that the discipline was for his participation in the strike. Tr. 85. Batista's claim was mirrored by Medina. Tr. 112. On the other side of the coin, Luna did not ascribe to Martinez any such statement, testifying that Martinez told him the discipline was for no call/no show. Tr. 121-122. Mendez himself brought up the issue of the strike as the reason for his non-attendance at work that night. Tr. 102. He claims a "lead" told him that the reason

for his discipline was the strike, but not Martinez or any ReadyJet managerial/supervisory employee. Tr. 103.[9]

Moreover, to assert that Martinez's alleged warnings implicitly threaten discharge because they imply incompatibility with continued employment does nothing more than tie management's hands vis-à-vis disciplining its own employees.

In this regard, any Martinez's warnings were simply a recitation of the reasonable and widely known employer policy regarding no call/no show. It is the employees themselves that inferred that because they were on strike, which was followed by a disciplinary notice, the notice must be related to the strike. Missing from their calculation was that even during a strike, they remain ReadyJet employees and must follow ReadyJet policies.

C. The ALJ erred in concluding that ReadyJet violated the Act by issuing disciplinary warnings to employees Claudio Batista, Francisco Luna, Julio Medina, Gerfi Mendez, and Sergio Restituyo.

The ALJ concluded that ReadyJet violated Section 8(a)(1) of the Act when written warnings were issued to Batista, Medina, Luna, Restituyo, and Mendez for their no call/no show on June 16, 2015. ALJ Dec. 12. Here, the ALJ applies the Burnup standard as defined in NLRB v. Burnup & Sims, Inc., 379 U.S. 21, (1964). There, the Court stated that:

> In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

NLRB v. Burnup & Sims, 379 U.S. 21, 23 (1964). The ALJ held that Burnup applied because of his finding that the disciplines meted out for conduct related to protected activity. ALJ Dec. 12. ReadyJet's position has been that the discipline was not related to protected activity, and

[9] On his part, Martinez testified only that he told the employees that the discipline was for no call/no show. Tr. 194-195.

therefore the Board should follow the mixed motive analysis articulated in Wright Line, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

ReadyJet's basis for this position rests in the fact that the discipline was not related to protected activity. Undeniably, the discipline was given because no call/no show.[10] It is ludicrous for this discipline to be deemed directly related to a strike simply because it occurred in the environment of protected conduct. Otherwise, any Union member can turn any discipline into a violation by claiming it is related to protected conduct. A grievant can challenge a disciplinary warning simply because it was given out during a Weingarten aided investigatory interview.[11] Contrary to the ALJ's decision, Martinez testified as to each discipline that it was based on the no call/no show and the employees' testimony varied. The final element in the Burnup analysis is the most troubling of errors in the decision because it was not wholly addressed in relation to the issuance of discipline. As stated above, Burnup requires that for an 8(a)(1) violation in connection with discipline for conduct related to protected activity, it must be shown that the employee was not, in fact, guilty of the misconduct. See, Burnup. There is plenty of evidence showing that none of the identified employees called in even though they know that they were not going to report for work as scheduled. The most significant of this evidence is the admission of the employees themselves. Each one acknowledges that they did not call in. Tr. 78, 93, 100, 104, 111, 120. The AJJ's conclusion that a violation occurred does not address this critical factor. If applied, the result would have to be that no violation occurred and the ALJ erred in this regard. ALJ Dec. 13.

[10] None of the other picketers from the strike were disciplined even though they took part in the strike. If the strike were the reason for the discipline, it makes no sense that ReadyJet would discipline five employees and no more.
[11] NLRB v. Weingarten, Inc. 420 U.S. 251 (1975).

The most glaring error in the ALJ's finding, decision and proceedings is regarding the discharge of Batista and Luna . ALJ Dec. 15 – 17. The ALJ refused to see the acts of Batista and Luna for what they are and are – for Batista it was derelict and disregard of ReadyJet's management of the workforce and for Luna, a performance violation that risked the safety and efficiency of the airlines it is contractually bound to serve.

Last in the ALJ's analysis is ReadyJet's disciplinary policy. Set for at ALJ Dec. 15, the critical aspects of the policy are the following:

- Each level of discipline need not be imposed in every case, but is dependent on all the circumstances and;
- Although not intended to cover every situation that may arise, the following are the general guidelines to be used in the progressive discipline process.

Clearly, ReadyJet reserved the authority to prescribe whatever discipline fits the offense. Tr. 254. Critically, the General Counsel presented no evidence that any employment relationship existed with Batista and Luna other than at-will. In this regard, the ALJ correctly found that at the time of the hearing, the Union had not been certified by the Board as the exclusive bargaining representation of ReadyJet's employees. ALJ Dec. 3.

The Board applies the Wright Line[12] framework to alleged violations of Section 8(a)(1) that turn on the employer's motive for discipline. Ferguson Enters., 355 NLRB 1121, 1129 189 LRRM 1519 (2010) (citing, among others, TLT Babcock Inc., 293 NLRB 163, 167 (1989)); see also Benjamin Franklin Plumbing, 352 NLRB 525, 537, 184 LRRM 1445 (2008), abrogated on other grounds by New Process Steel, L.P. v. NLRB, 560 U.S. 674, 130 S.Ct. 2635 (2010).

Under the Wright Line framework, "the General Counsel has the initial burden to prove that an employee's Section 7 activity was a motivating factor in the employer's action against the

[12] Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982)."

employee." David Saxe Productions, LLC, 2016 NLRB LEXIS 640, *15, 364 NLRB No. 100, (Aug. 26, 2016). "The elements commonly required to support the General Counsel's initial showing are union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer." Id. (citing Libertyville Toyota, 360 NLRB No. 141, slip op. at 4 (2014), enfd. 801 F.3d 767 (7th Cir. 2015)).

If the General Counsel carries the initial burden and establishes a prima facie claim, "the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the protected concerted activity." Id., at *15-16. The employer "cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." Bruce Packing Co., 357 NLRB 1084, 1086, 191 LRRM 1369 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015).

If the evidence establishes that the proffered reasons for the employer's action are pretextual -- i.e., either false or not actually relied upon -- the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct." David Saxe, supra, at *16 (citing Golden State Foods Corp., 340 NLRB 382, 385 (2003)).

Batista was terminated on August 5, 2015, due to attendance issues. Tr. 231. Prior to his termination (but subsequent to the June 16, 2015 strike), Martinez (Batista's manager) tried to accommodate Batista's request for Mondays off so Batista could attend school. Tr. 196, 231. Martinez offered Batista a schedule that would allow him to take Mondays off, but would require that he work weekends. Tr. 196. Batista rejected this accommodation. Id., Instead, Batista

started missing work on Mondays. Tr. 231. According to ReadyJet's General Manager, Sarah Colon, Batista was absent on the following Mondays:

- July 6, 2015 – called out
- July 13, 2015 –called out
- July 20, 2015 – invalid excuse
- August 3, 2015 – no call/no show

Tr. 233-235.

Luna, on the other hand, was terminated for fabrication of records. Tr. 198. Specifically, Luna entered into a chart that he completed water/lavatory service on an aircraft when he had not done the task. Tr. 198. This caused a delay in the ability of the air carrier to use the aircraft. Tr. 237-238. He had previously been written up for causing ReadyJet to incur a fine from Massport for failing to pick up trash. Tr. 236-240.

In handling these legitimate terminations, the ALJ constrains to harken every post-strike event to the strike. He excuses Batista's overt and brazen absences virtually every Monday after the strike, claiming that he would not have been discharged but for his participation in the strike. ALJ Dec. 16. Again, the progressive disciplinary policy reserves to ReadyJet the right to step up disciplinary measures. Although there is no delineation for the type of acts which would require increased penalties, certainly asking for Mondays off, rejecting an offer of Mondays off because it would require Saturday work, then being absent virtually every Monday thereafter qualifies. The ALJ's errors is in trying to stuff the foot (Batista's dereliction of Monday duty) in the shoe (no call/no show). It just does not fit.

As to Luna, the ALJ similarly errors because he again ignores ReadyJet's progressive disciplinary policy, which gives a non-union employer the leeway to apply its own policies on a

case-by-case basis in contemplation of all surrounding circumstances. Regardless of whether Luna participated in the strike, he cost the Company money and caused a delay in an air carrier's travel. He falsified a critical record that directly related to his duties and denied that he had done so. His testimony at the hearing about his termination was not simply inconsistent as described by the ALJ, but was incomprehensible and intended to distract.

For the ALJ to find that Batista and Luna would not have been terminated but for their protected activity is err given the above.

Respectfully Submitted,

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Dated: November 9, 2016

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CERTIFICATE OF SERVICE

I, John K. Baker, Esquire do hereby certify that on this 9th day of November, 2016, I served a true and correct copy of the foregoing Brief in Support of Exceptions of the Decision of the Administrative Law Judge, upon the following persons via electronic mail and United States first-class mail, postage prepaid and addressed as follows:

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